IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 859 of 2002

with

CRIMINAL MISC.APPLICATION No 2196 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NATHSING DILIPSING JAT SHIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 859 of 2002
   MR S.R.Divetia, learned MR.RAJESH M AGRAWAL
   for Petitioner No. 1-2
   Mr.A.J.Desai, learned A.P.P. for Respondent No. 1
2. Criminal Misc.Application No. 2196 of 2003
   MR S.R.Divetia, learned Mr.RAJESH M AGRAWAL
   for Petitioner No. 1
   Mr.A.J.Desai, learned A.P.P.for Respondent No. 1

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 23/05/2003

C.A.V. JUDGEMENT

1. Heard learned advocate Mr.S.R.Divetia for Mr.R.M.Agrawal learned advocate for the appellants and Mr.A.J.Desai, learned A.P.P. for the respondent-State.

2. The only point canvassed by the learned advocate for the appellants in this appeal is that "Poshna Doda" (poppy straw) cannot fall under the definition of Sec. 2(xviii) in relation to Narcotics Drugs and Psychotropic Substances Act, 1985 as amended u/s 15 of the N.D.P.S.(amendment) Act, 2001 and thereby challenged the correctness, legality, validity and propriety of the conviction and sentence of R.I. for three years and fine of Rs.30,000/- each in default to undergo rigorous imprisonment for one year as ordered by the learned Addl.Sessions Judge, Fast Track Court, Kutch-Bhuj in Sessions case no. 110 of 2000 rendered on 07.10.02.

3. Learned advocate for the appellants prayed for bail of the appellants by filing the present second criminal misc. application, as their first bail application being Criminal misc. application no. 7468 of 2002 was withdrawn, however, at the time of withdrawal of the aforesaid bail application, this Court (Coram : R.P.Dholakia, J) has directed the office to place the appeal on final hearing board in the week commencing from 1st February, 2003.

4. As stated above, the only point canvassed by the appellants advocate is that as per Sec. 41 of the new N.D.P.S.Act, though alleged commission of offence has taken place on 18.7.00 and though the provision of the new N.D.P.S.Act came into force with effect from October 2, 2001, the Addl.Sessions Judge, Kutch-Bhuj has not taken into consideration the quantity of the poppy straw as stated in the above law. As per the new N.D.P.S.Act, small quantity is 1,000 grams and commercial quantity is 50 kg. Thus as per the prosecution case itself, the appellants were found to be in possession of greater than small quantity and lesser than commercial quantity of poppy straw and when it is so sec. 15(b) of the New N.D.P.S.Act is applicable and punishment inflicted on the present appellants is absolutely illegal, erroneous, unwarranted on the facts and circumstances of the prosecution case.

5. According to the learned advocate for the appellants, at the time of the alleged seizure, the appellant no. 1 was alleged to have been in possession poshna doda of 6 kg. whereas the appellant no. 2 was in possession of 3 kg. The poppy straw prescribed under the Act is 50 kg. The learned trial Judge has erred in not going through the provisions of law. The learned trial Judge has failed to use the discretion properly and judiciously keeping in view the nature of Narcotic Drugs and difference between quantity alleged to be seized and commercial quantity prescribed for the same. Therefore, runs the submissions of learned advocate for the appellants, that on this count only this Court should acquit both the appellants. In support of his submissions, the learned advocate for the appellants has relied upon the decision in case of Hathi @ Mangalsinh Ramdayalji V/s State of Gujarat reported in 1993(2) G.L.R. 1743.

6. Against the aforesaid submissions, Mr.A.J.Desai, learned A.P.P. for the respondent-State has submitted that if we look to the definition of Poppy straw, it means all parts (except the seeds) of the opium poppy after harvesting whether in their original form or cut, crushed or powdered and whether or not juice has been extracted therefrom.

7. Relying on the aforesaid definition, the learned A.P.P. for the State, has relied on the reports produced at page 77 to 79. According to the learned A.P.P. all the tests done by the Forensic Science Laboratory (for short F.S.L.) are shown positive and in the opinion of the F.S.L. expert, the muddammal articles were found to be poppy straw as defined in N.D.P.S.Act, 1985. At page 79 of the report, produced at the paper book, the expert of F.S.L. has found both the muddammal articles dried pale brownish yellow fragments of plant. On botanical and microscopy examination of both the muddammal articles, another expert of F.S.L. also came to the conclusion that on the basis of morphological and microscopical characteristics the muddammal articles were identified as fragments of peduncle (stalk) thalamus capsule and stigma of papaver (poppy straw).

8. In the aforesaid facts and circumstances of the case, in the submissions of learned A.P.P. for the State, the appeal of the present appellants requires to be dismissed.

9. I have perused the record and proceedings of the

trial court. I have also gone through the depositions of the witnesses and authority cited by learned advocate for the appellants. As discussed above, the only question arises for my consideration is whether the Poshna doda (poppy straw) as found in the possession of the present appellants can be said to be covered in the definition of poppy straw or not. For that purpose, there is no option but to rely on the F.S.L. report produced at page 77 to 79 in the paper book. After marathon tests such as appearance, smell, chemical analysis, marquis test, meconic acid test, porphyroxine test, thin layer chromatography and other tests such as botanical examination and microscopy test, the F.S.L. expert have rightly come to the conclusion that the muddammal articles which were found from the present appellants are nothing but "poshna doda" (poppy straw) as described in the definition of poppy straw in N.D.P.S.Act, 1985.

10. In case of Hathi @ Mangalsinh Ramdayalji (supra), it appears that as the botanical report was not on record, expert was examined as witness. Thereupon, this Court considered whether the straw was substance of opium or not. In the case before me, there is botanical report, however, from the record it appears that no witness has been examined and there is no cross-examination on the ground whether straw contains opium or not. So far as the quantity is concerned, as per the new N.D.P.S.Act, less quantity is 1000 grams and more quantity is 50 kg. Both the appellants were having more than small quantity and therefore it cannot be said that they were holding small quantity prescribed under the Sec. 2 of the Act.

11. According to the learned advocate for the appellants, the sentence and fine is more and is disproportionate to the offence that they have committed. I am of the opinion that looking to the facts and circumstances of the case and as both the appellants are residents of Punjab, they will not be able to pay fine. Therefore, if the fine is reduced to Rs.20,000/- each the purpose will be served.

12. In the result, this appeal is partly allowed. The conviction and sentence awarded by the trial court of rigorous imprisonment for three years is confirmed and the fine is reduced to Rs.20,000/- each in default to undergo rigorous imprisonment for one year.

13. Bail refused. Criminal misc.application no. 2196 of 2003 is disposed of accoringly. Notice discharged.

(SHARAD D DAVE, J)

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